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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANIEL K. MILLER, Plaintiff and Respondent, v. JOHN L. JONKMAN, Defendant and Appellant.	G054959 (Super. Ct. No. 30-2014-00719959) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randall J. Sherman, Judge. Reversed.

Ascher & Associates, Ralph Ascher, and Richard Vergel de Dios for Defendant and Appellant.

Stephen Thomas Erb, and Stephen T. Erb for Plaintiff and Respondent.

Plaintiff Daniel K. Miller's father, Donald, and defendant John L. Jonkman were partners in storage business. The business leased the land it operated on, and each partner had an equal share of the leasehold estate. However, record title to the leasehold estate was solely in Donald's name. After Donald passed away, his share of the business and leasehold estate was split evenly between plaintiff and his sister Lona Gray. In June 2007, defendant agreed to purchase plaintiff's interest in the business and leasehold estate. He promised to pay on a $575,000 promissory note by a certain date, and to pay monthly interest-only payments in the interim. Defendant made the monthly interest-only payments until October 2013, and never repaid the principal. Subsequently, plaintiff sued defendant for breach of the promissory note.

Following a bench trial, the trial court ruled in favor of plaintiff and against defendant. It determined that certain contractual provisions deferring the date payments were due on the promissory note had expired in August 2007. Alternatively, it found that defendant had waived these deferral provisions.

Defendant contends the trial court misinterpreted the deferral provisions. He further contends there was no waiver. We agree. As explained below, the deferral provisions did not expire in August 2007. In addition, the undisputed evidence does not show waiver. Accordingly, we reverse the judgment against defendant.

FACTS[1]

1. *Agreement for Purchase and Sale*

On June 13, 2007, the parties entered into an agreement whereby plaintiff would sell his 25 percent interest in The Pomona Partnership doing business as Personal Storage (Company) to defendant (hereinafter Agreement). In the Agreement, plaintiff also agreed to transfer and convey to the Company the leasehold interests previously held by Donald, which "relate to those certain parcels upon which [t]he Company conducts its

[1] We decline to grant defendant's request for judicial notice of two documents, as the documents are not relevant to the dispositive issues on appeal.

operations." In exchange, defendant would deliver an executed original of a promissory note.

Section 6.0 of the Agreement provides: "The Parties will receive and review a preliminary title report for the real property on which [t]he Company conducts its operations and to which [t]he Company holds title. [Plaintiff] agrees to either clear or bond around all liens, encumbrances, and other clouds, if any, on title that result from obligations arising in his name or in the name(s) of Donald K. Miller, The Estate of Donald K. Miller or any of its Co-Administrators, [including] Lona D. Gray . . . ."

Section 9.0 of the Agreement provides: "In the event [plaintiff] does not clear title or bond around all liens, encumbrances, and other clouds on title as required by Section 6.0, hereinabove, on or before August 31, 2007, then [defendant] may elect to rescind this Agreement and cancel the Note given in connection therewith. This right to rescind may be exercised by [defendant] at any time after August 31, 2007, up until such time as [plaintiff] has complied with his duties under Section 6.0 hereinabove."

Finally, Section 13.0 of the Agreement provides in relevant part: "This Agreement and the Note given in connection therewith contain the entire agreement between the Parties respecting the subject matter hereof, and it supersedes all prior agreements between the Parties respecting such matters. It may only be modified in writing signed by the Party who is to be charged with such modification. No waiver of any provision[] of this [A]greement or the Note given in connection therewith shall constitute a waiver of any other provision, [n]or shall such waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the Party giving the waiver."

2. *Promissory Note*

On June 13, 2007, the parties executed a promissory note (Note) with the principal amount of $575,000. According to the terms of the Note, defendant agreed to pay plaintiff monthly interest-only payments on the first day of each month beginning

July 1, 2007. The principal was due on or before June 30, 2012, but the date of "payment shall be extended until such time as all liens, encumbrances, and clouds on title have been removed or bonded around pursuant to Section 6.0 of that certain Agreement for Purchase and Sale of Partnership and Leasehold Interests." The unpaid principal amount bore a simple interest rate of 10 percent annually. However, "the date accrual of interest commences shall be extended until such times as all liens, encumbrances, and clouds on title have been removed or bonded around pursuant to Section 6.0 of [the Agreement]." Monthly payments made after the 10th of the month would incur a 5% late payment charge, but charges would "be assessed only once and only if all liens, encumbrances and clouds on title have been removed or bonded around pursuant to Section 6.0 [of the Agreement]." Finally, the "Note shall be cancelled and declared void in the event [defendant] properly invokes his right of recession under Section 9.0 [of the Agreement]."

3. *Complaint for breach of the Note*

On April 30, 2014, plaintiff filed a complaint for damages for breach of the promissory note against defendant. The complaint alleged that on June 13, 2007, defendant had signed and delivered the Note to plaintiff. On January 31, 2009, plaintiff agreed to reduce the principal amount of the Note from $575,000 to $535,000. "All other terms, conditions, and the maturity date of the Note remained unchanged." In July 2012, plaintiff agreed to accept defendant's continuing payments of monthly interest-only payments rather than demand full payment of the principal amount. The complaint alleged that defendant failed to make the monthly interest-only payments for October and November 2013. On November 12, 2013, plaintiff provided defendant with a written demand for payment of the full principal amount plus the overdue monthly-interest only payments. Although defendant acknowledged receiving the written demand, he made no payments. The complaint sought damages in the amount of the principal sum, prejudgment interest, late payment charges, and attorney fees and costs for the suit.

4. *Defendant's answer*

Defendant filed an answer generally denying the allegations in plaintiff's complaint. As separate affirmative defenses, defendant asserted that plaintiff's claims were barred or his (defendant's) obligations to perform were excused because of plaintiff's "numerous failure of performance in accordance with the underlying contractual requirements."

5. *Defendant's disclosure statement in his Chapter 11 bankruptcy*

Defendant declared bankruptcy in September 2014. On March 6, 2015, defendant filed his debtor's disclosure statement, listing his various assets and debts. Defendant listed the Note as a debt not contingent, unliquidated or disputed.

6. *Defendant's Notice of Rescission and Cancellation*

On September 16, 2016, defendant hand-delivered a written "Notice of Rescission," seeking to rescind the Agreement and cancel the Note. On September 24, 2016, plaintiff rejected the notice of rescission.

7. *Bench trial*

At trial, defendant testified that in 2004 or 2005, he had problems refinancing a loan on the storage business because the title to the lease was in Donald's name. Defendant told plaintiff of the title problem, and plaintiff responded that he would take care of it. Defendant was aware when he agreed to purchase plaintiff's interests in the storage business that there were clouds on the title of the partnership's property. Specifically, the property was still in Donald's name. However, defendant believed that plaintiff had resolved the issue. Thus, no preliminary report was obtained in 2007.

Defendant acknowledged making payments on the Note until October 2013. At no time did he make a written demand to plaintiff to clear any clouds on title. Nor did defendant ever inform plaintiff that the reason defendant did not pay in October 2013 was because there were clouds on the title. Defendant acknowledged that in his bankruptcy filing, he did not dispute his obligations under the Note. Defendant testified

he first learned there was an outstanding title issue in December 2015, when a prospective buyer of the storage business informed him and provided a preliminary title report. Defendant acknowledged that in response to a form interrogatory served on him on June 24, 2016, he stated he was not aware of any breach of the Note. Additionally, he never disclosed the preliminary title report he received from the prospective buyer.

Plaintiff testified Donald died in October 1989 and the estate went into probate. As part of the distribution from his father's estate, plaintiff and his sister Gray received 25 percent of their father's interests in the storage business. Plaintiff sold his interests in the business and lease to defendant in 2007. At the time, plaintiff and defendant were friends, and it was a "handshake deal." Plaintiff testified he first learned that defendant had concerns about the title to the leasehold estate when defendant served the notice of rescission in September 2016. Plaintiff testified he believed and intended the Agreement to convey and transfer his interests in the property, including his interest in the leasehold estate. Plaintiff acknowledged never bonding around any issue with the title. He never obtained any title report to determine whether there were any clouds on title. Plaintiff testified it was his intent that defendant obtain property he could sell or refinance.

Dave Balassi, a vice-president with Chicago Title Company, testified that the owner of record of the leasehold estate is Donald. Balassi opined that the fact that record title is in Donald's name constitutes a cloud on title. He further opined that defendant had no insurable title to the leasehold estate. Balassi also opined that the written Agreement would not be accepted for recording by the county recorder of Los Angeles because an agreement for sale of a partnership interest is not among the documents accepted for recordation.

Lawrence H. Jacobson, a real estate broker and attorney, stated that he did not disagree with Balassi's opinions. Jacobson opined that the order of distribution of the Estate of Donald K. Miller was not recordable because it did not contain a legal

description of the leasehold estate or an assessor's parcel number. Defendant could not correct these defects to make the order of distribution recordable.

In response to Balassi's testimony, the trial court suggested that plaintiff should remedy any issue with the record title by recording the final distribution order in the probate case and the assignment of the lease. Following Jacobson's testimony, the court continued the trial to November 14, 2016. After trial resumed, Natalie Nguyen, a real estate attorney, testified that she was retained in October 2016 to assist plaintiff in obtaining an insurable title on the leasehold estate**.** Nguyen testified the distribution order was recorded October 2, 2016, and the assignment of the lease was recorded November 10, 2016. On November 14, 2016, First American Title committed to providing title insurance for the leasehold estate.

8. *Trial court's Statement of Decision*

On January 20, 2017, the trial court issued a written statement of decision. The court interpreted Section 6.0 of the Agreement as requiring the parties "*to obtain a preliminary title report in 2007* identifying the liens, encumbrances, and clouds to be removed." "The report was never ordered, and [defendant's] rights therefore expired or alternatively, were waived by [defendant's] subsequent course of conduct." The court determined that the sole remedy for breach of Section 6.0 of the Agreement is rescission pursuant to Section 9.0. It ruled that the "limited contractual right of rescission" could not have been invoked in this case because defendant failed to timely invoke it or offer to tender the return of all benefits received. It concluded that "[r]escission simply is not an issue in this case."

The court further concluded that the "plain meaning" of the relevant provisions in the Note and Agreement "do not support [defendant's] contention that he need not pay the Note and the interest accrued thereon until all 'clouds on title' have been removed." It interpreted the deferral provisions as requiring that a preliminary title report be obtained some reasonable time prior to August 31, 2007. Because no preliminary

report was obtained, "the rights and obligations under Section 6.0 with respect to identified liens, encumbrances, and clouds on title expired, by the provision's own terms, on August 31, 2007."

The court further determined that to the extent the Section 6.0 rights have not expired, "[defendant] long ago waived those rights" by not making written demands for performance, making monthly interest-only payments for six years, and admitting in federal bankruptcy court that plaintiff's claim was uncontested and approved. The court also found that the only remedy under Section 6.0 was rescission pursuant to the terms of Section 9.0 of the Agreement.

Finally, the court found that after being informed of the title issues by defendant and during the pendency of trial, plaintiff removed "all liens, encumbrances and clouds on title attributable to his late father, his father's estate, his sister Gray, and [plaintiff] himself." The court awarded a money judgment in the amount of $535,000 with prejudgment interest rate at the contract rate of 10 percent from October 1, 2013, plus prejudgment interest, costs and fees and costs of collection as the prevailing party.

DISCUSSION

We independently review a trial court's interpretation of a contract, but we defer to the trial court's determination of the credibility of any admissible extrinsic evidence. (See *Kusmark v. Montgomery Ward & Co.* (1967) 249 Cal.App.2d 585, 587 ["'It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence'"].) "[W]here extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld." (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.)

In interpreting the contracts at issue, we are guided by several maxims of interpretation. First, "[a] contract must be so interpreted as to give effect to the mutual

intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) If the contract is reduced to writing, the mutual intention of the parties is to be ascertained from the writing alone, if possible. (Civ. Code, § 1639.) The words in a written contract must be understood in their ordinary and popular sense, and if the language of a contract is clear and explicit, the language governs the interpretation of the contract. (Civ. Code, §§ 1638, 1644.) Moreover, "[t]erms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement." (Code Civ. Proc., § 1856.) Finally, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other," and interrelated contracts must be interpreted together. (Civ. Code, §§ 1641, 1642.)

The Note expressly provides that defendant has no obligation to make any payments until plaintiff either clears or bonds around all liens, encumbrances, and clouds on title. Paragraph 1 of the Note provides that the due date on payment of the principal "shall be extended until such time as all liens, encumbrances, and clouds on title have been removed or bonded around pursuant to Section 6.0 of [the Agreement]." Paragraph 2 provides that "the date accrual of interest commences shall be extended until such times as all liens, encumbrances, and clouds on title have been removed or bonded around pursuant to Section 6.0 [of the Agreement]." Paragraph 4 provides that late payment charges would "be assessed only once and only if all liens, encumbrances and clouds on title have been removed or bonded around pursuant to Section 6.0 [of the Agreement]."

At trial, Balassi's unchallenged expert opinion was that there was a cloud on the title of the leasehold estate. In its statement of decision, the trial court found that any liens, encumbrances, and clouds on title had been removed during the *pendency of trial*. Trial testimony indicates this occurred in November 2016. Thus, at a minimum, defendant was not in default on the Note until that time. However, the complaint for

damages alleged that defendant defaulted in October 2013, and it was never amended to allege that defendant was in default in November 2016. Therefore, there is no basis for the trial court's judgment against defendant. (See *Castaic Clay Manufacturing Co. v. Dedes* (1987) 195 Cal.App.3d 444, 449 ["It is the general rule that, in a contested cause, in the absence of an amendment to the complaint to conform to proof, a court may not award the plaintiff a sum in excess of the amount of damages he claims to have sustained"].)

The trial court determined that any rights conferred by Section 6.0 of the Agreement are limited to the *exclusive* remedy of rescission set forth under Section 9.0 of the Agreement. We disagree. Defendant's obligations to pay on the Note are defined in the Note. Under paragraphs 1, 2 and 4, the deferral of payments is conditioned on plaintiff's compliance with Section 6.0 of the Agreement. In contrast, the contractual right to rescission under Section 9.0 of the Agreement is referenced in paragraph 6 of the Note in connection with defendant's right to cancel the Note. This contractual right to cancel is separate and distinct from defendant's obligations to pay on the Note.

The trial court also concluded that Section 6.0 of the Agreement expired, by its own terms, on August 31, 2007. The plain language of the Agreement does not support that interpretation. Although Section 6.0 does not contain any expiration date, Section 9.0 of the Agreement provides that in "the event [plaintiff] does not clear title or bond around all liens, encumbrances, and other clouds on title as required by Section 6.0, hereinabove, on or before August 31, 2007, then [defendant] may elect to rescind this Agreement and cancel the Note given in connection therewith. The right to rescind may be exercised by [defendant] at any time after August 31, 2007, up until such time as [plaintiff] has complied with his duties under Section 6.0 hereinabove." It would be nonsensical for defendant to have the right to rescind the Agreement *after* August 31, 2007 on the ground that plaintiff failed to comply with Section 6.0 if Section 6.0 had

expired *on* that date. Rather than an expiration date, August 31, 2007 is the deadline for plaintiff to comply with the terms of Section 6.0.

In a related determination, the court concluded that because defendant never ordered a preliminary title report in 2007, he could not properly and timely invoke his rights under Section 6.0 of the Agreement. As detailed above, Section 6.0 provides that the "Parties will receive and review a preliminary title report for the real property on which [t]he Company conducts its operations and to which [t]he Company holds title." By its express language, this provision does not impose a burden on defendant (or plaintiff) to order a preliminary title report. Nor is receiving and reviewing a preliminary title report an express precondition to defendant's right to rescind the Agreement or cancel the Note under Section 9.0 of the Agreement. At best, the provision may be interpreted as placing both parties on notice of any liens, encumbrances, or clouds on title that appear in the preliminary title report.

Finally, the trial court determined that defendant waived his right to defer payments. We conclude that substantial evidence does not support the court's finding of waiver. (See *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 983 ["the question of waiver is one of fact, and an appellate court's function is to review a trial court's findings regarding waiver to determine whether these are supported by substantial evidence"].) First, under paragraph 13 of the Note, a waiver of any provision in the Note must be made in writing. (See Note, § 13.0 ["No waiver shall be binding unless executed in writing by the Party giving the waiver."].) No evidence was presented at trial indicating a written waiver exists.

Second, "'"'[w]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].'" (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 31, quoting *City of Ukiah v. Fones* (1962)

64 Cal.2d 104, 107-108.) The finding of waiver was based on defendant's failure to make written demands for performance, his making monthly interest-only payments for six years, and his admitting in federal bankruptcy court that plaintiff's claim was uncontested. However, defendant's uncontradicted testimony at trial was that he was not aware plaintiff had not complied with Section 6.0 of the Agreement until December 2015. Thus, before that date, defendant believed the Note was valid and his payment obligations had started. Defendant's failure to make written demands for performance before that date, his monthly interest-only payments until October 2013, and his affirmance of the Note in federal bankruptcy court in March 2015 were based on that belief, and do not demonstrate waiver. It was not reasonable to infer from defendant's conduct that he knowingly waived his right to delay the payments under paragraphs 1, 2 and 4 of the Note. In short, substantial evidence does not support the trial court's finding of waiver. Accordingly, the trial court's judgment against defendant must be reversed.

DISPOSITION

The judgment is reversed. Defendant is entitled to his costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.